SUPREME COURT NO. 79252-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

LEO C. BRUTSCHE,

Petitioner,

vs.

CITY OF KENT, a municipal corporation,

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

The Honorable Brian Gain, Judge

AMENDED SUPPLEMENTAL BRIEF OF PETITIONER

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RULES, STATUTES AND OTHERS

I. *Introduction*

Leo C. ("Pat") Brutsche, petitioner, owns property which was subject to a police raid which resulted in damage to the property. The Court of Appeals held that Mr. Brutsche could not recover under his negligence and takings theories. We petitioned for review. On July 10, 2007, the petition was granted by this Court as to the common law negligence claim issue and the taking issue. This amended supplemental brief, correcting several typos, is submitted on behalf of petitioner in support of reversal of the Court of Appeals.

II. *This Court Should Reverse the Court of Appeals and Hold that Property Owners Can Recover from a Municipality for the Negligent Damage to or Destruction of Property Caused by Police Officers During the Execution of a Search Warrant.*

In the trial court and on appeal, Mr. Brutsche contended that the damage to his property inflicted by the City of Kent was actionable in negligence. We rely on this Court's decision in *Goldsby v. Stewart*, 158 Wash. 39, 290 P. 422 (1930). *Goldsby* held:

> In executing a search warrant, officers of the law should do no unnecessary damage to the property to be examined, and should so conduct the search as to do the least damage to the property consistent with a thorough investigation. *Luther v. Borden*, 7 How. 1, 12 L. Ed. 581; *Buckley v. Beaulieu*, 104 Me. 56, 71 A. 70, 22 L.R.A. (N.S.). 820.

Goldsby is on point.[1]

In addition to *Goldsby*, we also rely on a number of decisions of this Court which hold that law enforcement activities are reachable in negligence.[2]

In this supplemental brief, we wish to bring additional authority to the Court's attention in support of our position.

In *Wright v. United States*, 963 F. Supp. 7 (D.D.C., 1997), a U.S. Park Police SWAT team raided the Wrights' home pursuant to a search warrant for illegal firearms. The police claimed that the search warrant was "high risk". *Wright*, 963 F. Supp. at 11. The trial court found that during the room-by-room search of the house, the U.S. Park Police negligently damaged several pieces of jewelry, photographs and picture frames. *Wright*, 963 F. Supp. at 15.

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[1] In *Buckley v. Beaulieu* , *supra*, cited in *Goldsby*, police searched the plaintiff's dwelling house for intoxicating liquors alleged to be concealed therein. After searching the house, the police found nothing. The occupants declared there were no liquors in the house. The officers then used an axe, pickaxe and crowbar to cause property damage to the interior walls of the home. They then departed, leaving the occupants to repair the damage. *Buckley*, 71 A. at 71-72.

The Supreme Judicial Court concluded:

> Upon these facts we think it clear that the manner and extentof the search in this case were unreasonable and in excess of the officers' authority. Even if, under all the circumstances, not believing any liquors to be concealed there, they could lawfully have probedthe walls in hope of finding a pipe or other clue of the existence of which they had found no indications, such probing could have been sufficiently made with some slender probe with comparatively little injury. The destructive use of axe, pickaxe, and crowbar for that purpose was unnecessary and unreasonable, and hence unlawful. ...
>
> Officers must not allow their zeal and beliefs to blind them to the rights of owners and occupants of the dwelling house they search. ... The owner was not even accused. However confident the officers were of the guilt of the occupant, the house and its owner were not thereby outlawed.

Buckley, 71 A. at 72. *Buckley* furnishes support for plaintiff's position here.

[2] *See* our Petition for Review, pages 7-9.

The case was brought under the Federal Tort Claims Act. Under that Act, the United States may be held directly liable for the torts of its employees committed during the course of their employment where their actions constitute a breach of the common law as articulated by the local courts. *Wright*, 963 F. Supp. at 15. The court in *Wright* concluded that the analogous common law claims fall under the rubric of negligence, as well as other tort claims. The court concluded:

> Lastly, with regard to the alleged property damage, the evidence indicates that the police officers acted negligently in the course of searching the house, opening drawers and closets, and removing and inspecting items of personal property. Therefore the Wrights and Cruzes [the plaintiffs] will be awarded compensatory damages for their property loss.

Wright, 963 F. Supp. at 19. *Wright*, like *Goldsby*, furnishes direct support for Mr. Brutsche's negligence claim based upon property damage caused by the police during the execution of the search warrant.

In *Herman v. State of New York*, 78 Misc.2d 1025, 357 N.Y. S.2d 811 (N.Y. Ct. Cl. 1974), New York state police obtained a "no-knock" search warrant. They raided the wrong house–the home of the Hermans. As in the Brutsche case, nothing was seized. The Court of Claims held that since the police negligently obtained and executed the warrant on the wrong parties at the wrong house, the State of New York was responsible for the resulting damages. The court awarded special and general damages, including damages for property damage caused. *Herman*, 78 Misc.2d at 1031-1032, 357 N.Y.S. 2d at 817-818.

III. *This Court Should Reverse the Court of Appeals and Hold That The Damaging or Destruction of the Property of an Innocent Third Party by Police Activity, Where No Evidence Is Seized or Prosecution Instituted, Constitutes a Compensable Taking Under Article I, § 16 of the Washington Constitution.*

In our case, police entered petitioner Pat Brutsche's property, damaged the structures on the property, and left. They found no evidence. They seized nothing. There was no resulting criminal prosecution.

Article I, § 16 of our state Constitution provides in pertinent part that:

> No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner, ...[3]

Under this constitutional provision, this Court should hold that Mr. Brutsche should receive just compensation from the City of Kent [4] for the property damage.

A. *Other State Court Authority Supporting Petitioner's Just Compensation Claim.*

A number of state courts have held that where police activity causes damage to the property of an innocent third party, such damage is compensable under the Just Compensation Clause of their state constitutions. We urge the Court to find the analysis in these cases to be persuasive.

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[3] A copy of Const., Article I, § 16 is reproduced in the appendix at page A-1. In this brief, we refer to this clause and similar clauses in other constitutions as the "Just Compensation Clause". *See First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 316, 317, 319, 107 S. Ct. 2378, 96 L. Ed. 2d 650 (1987) (referring to the Fifth Amendment "Just Compensation Clause").

[4] The City of Kent, as a municipality, is the named defendant in this case. We did not name nor do we seek compensation from any of the individual officers in this state court proceeding.

1. *Steele v. City of Houston, 603 S.W.2d 786 (Tex. 1980).*

The leading case is *Steele v. City of Houston*, 603 S.W.2d 786 (Tex. 1980).[5] In *Steele*, three escaped convicts took refuge in a home owned by Mr. Steele, an innocent third party. Police fired incendiary material into the home which caused it to burn. The Texas Supreme Court held that innocent third parties are entitled by the Constitution to compensation for their property when it is destroyed through police action. *Steele*, 603 S.W.2d at 789-793.[6]

Admittedly, some courts have held that property damage caused by police activity is not compensable because it allegedly falls under the rubric of "police power". The *Steele* decision is important because it notes that:

> ... this court has moved beyond the earlier notion that the government's duty to pay for taking property rights is excused by labeling the taking as an exercise of police powers.

Steele, 603 S.W.2d at 789. The Court noted that there is no exception or limitation in the language of the Just Compensation Clause of the Texas Constitution. 603 S.W.2d at 791. The Court noted that while the police retain the power to cause property damage in carrying out their law enforcement

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[5] The reasoning of *Steele* was found persuasive by Chief Justice Alexander and Justice Sanders in dissent in *Eggleston v. Pierce County*, 148 Wn.2d 760, 777, 787, 64 P.3d 618 (2003). As discussed below, the majority ruling in *Eggleston* is distinguishable from our case because that decision turned on protection of the government's ability to prosecute criminal cases using seized evidence. That concern is absent here.

[6] The Texas Just Compensation Clause analyzed in *Steele*, Article I, § 17 of the Texas Constitution, provides:

> No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person; and, when taken, except for the use of the State, such compensation shall be first made, or secured by deposit of money....

Steele, 603 S.W.2d at 788. This provision is almost identical to Article I, § 16 of our state's constitution. *Eggleston*, 148 Wn.2d at 627-628 (Alexander, C.J., dissenting).

activities, innocent third parties are entitled by the Constitution to receive compensation for that damage:

> ... [G]overnmental immunity does not shield the City of Houston. The Constitution itself is the authorization for compensation for the destruction of property and is a waiver of governmental immunity for the taking, damaging or destruction of property for public use....
>
> The City argues that the destruction of the property as a means to apprehend escapees is a classic instance of police power exercised for the safety of the public. We do not hold that the police officers wrongfully ordered the destruction of the dwelling; we hold that the innocent third parties are entitled by the Constitution to compensation for their property.

Steele, 603 S.W.2d at 791, 793.

We urge the Court to employ this approach in our case.

2. *Wegner v. Milwaukee Mutual Insurance Co., 479 N.W.2d 38 (Minn. 1992).*

In the *Wegner* case, police deployed flash-bang grenades and tear gas canisters into a home in an attempt to expel an armed suspect. The tear gas and grenades caused extensive damage to the Wegner home. The Minnesota Supreme Court held that Ms. Wegner was entitled to compensation under the Just Compensation Clause of the Minnesota Constitution.[7] As in *Steele*, the Court recognized that the focus should *not* be on the propriety of the actions of the police. *Wegner*, 479 N.W.2d at 41, fn.4. Instead, the Court focused on the importance of compensating the injured, innocent third party:

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[7] Article I, § 13 of the Minnesota Constitution provides: "Private property shall not be taken, destroyed or damaged for public use without just compensation, first paid or secured." *Wegner*, 479 N.W.2d at 40. This provision is similar to the Washington Constitution's Just Compensation Clause.

> We are not inclined to allow the city to defend its actions on the grounds of public necessity under the facts of this case. [Citation omitted.] *We believe the better rule, in situations where an innocent third party's property is taken, damaged or destroyed by the police in the course of apprehending a suspect, is for the municipality to compensate the innocent party for the resulting damages.* The policy considerations in this case center around the basic notions of fairness and justice. At its most basic level, the issue is whether it is fair to allocate the entire risk of loss to an innocent homeowner for the good of the public. We do not believe the imposition of such a burden on the innocent citizens of this state would square with the underlying principles of our system of justice. Therefore, the City must reimburse Wegner for the losses sustained.

Wegner, 479 N.W.2d at 42 (emphasis added).

Wegner, like *Steele*, recognizes that the issue is not whether the police are somehow "at fault" for causing property damage. Instead, the decision recognizes that although police may damage to property in the course of their duties, the property owner is entitled, under the Constitution, to compensation. This Court should so rule given the facts of our case.[8]

3. *McGovern v. City of Minneapolis, 480 N.W.2d 121 (Ct. App. Minn. 1992).*

In *McGovern*, police sought and obtained a "no-knock" search warrant. They launched a forced entry by crashing through an exterior wall of the building. Drugs and weapons were recovered. The Minnesota Court of Appeals followed *Wegner*. The Court determined that the intentional entry was for a public purpose within the meaning of the Constitution and was a "compensable taking for public use". *McGovern*. 480 N.W.2d at 127. The

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[8] *Wegner* was discussed in *Eggleston*, 148 Wn.2d at 773.

court noted that: "If the landlords are innocent third parties, they are entitled to compensation as a matter of law pursuant to *Wegner*." *McGovern*, 480 N.W.2d at 127.[9]

B. *Petitioner Pat Brutsche Should Receive Compensation for the Damage to His Property.*

Policy considerations of fairness and justice underly the Just Compensation Clause of the Washington Constitution and the similar constitutional provisions of the other states discussed herein. As this Court has recognized:

> The talisman of a taking is government action which forces some private persons alone to shoulder affirmative public burdens, 'which, in all fairness and justice, should be borne by the public as a whole.'

Mission Springs, Inc. v. City of Spokane, 134 Wn.2d 947, 964, 954 P.2d 250 (1998) (quoting *Armstrong v. United States*, 364 U.S. 40, 49, 80 S. Ct. 1563, 4 L. Ed. 2d 1554 (1960)).

The policy considerations justifying compensation in the state court cases cited above are much stronger in petitioner Pat Brutsche's case. In *Steele*, the police were attempting to recapture three escaped convicts who had taken refuge in the plaintiffs' home. In *Wegner*, the police fired tear gas and flash-bang grenades into the home during the course of apprehending an armed suspect who had barricaded himself therein. In *McGovern*, the police dam-

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[9] The *McGovern* court held that the individual officers were not personally liable for the taking. *Ibid.*

aged property when they entered a fortified home, where they seized drugs and firearms.

By contrast, in the instant case, police went to petitioner's property, damaged his property, and left. The police found no evidence. They seized nothing. There was no criminal prosecution. As such, of all the cases discussed, the instant case is the strongest case for compensation under Article I, § 16 of the Washington Constitution.

C. *Eggleston v. Pierce County Is Distinguishable.*

The Court of Appeals below held in our case that there was no taking given the majority opinion in *Eggleston v. Pierce County*, 148 Wn.2d 760, 64 P.3d 618 (2003). In *Eggleston*, a 6-1-2 decision,[10] police rendered Mrs. Eggleston's property uninhabitable when they removed a load-bearing wall from her home, purportedly to use as evidence in a criminal prosecution. The majority held that the police seizure of two walls and other items did not constitute a taking under the Washington Constitution.

Our case is distinguishable from *Eggleston*. The *Eggleston* majority was concerned with protecting the government's ability to prosecute criminal cases using seized evidence. The majority stated it could find no state case that holds or supports the proposition that the seizure or preservation of evidence can be a taking. *Eggleston*, 148 Wn.2d at 768, 770. The majority noted federal court cases finding that the seizure of evidence, including the

[10] Justice Ireland concurred with the majority on procedural grounds but stated that she found *Steele* persuasive where the property of an innocent third party is destroyed. 148 Wn.2d at 776.

seizure of persons jailed to ensure their appearance at a criminal trial, did not constitute a taking. *Eggleston*, 148 Wn.2d at 774-775.

The *Eggleston* majority's concerns are absent here. No evidence was found, nothing was seized, and no criminal prosecution was brought. *Eggleston* is distinguishable.

D. *If Eggleston Is Not Considered Distinguishable by the Court, Then It Should Be Overruled.*

There are three grounds to overrule *Eggleston*.

First, to the extent that *Eggleston* held that the damage to the property of an innocent third party constitutes a non-compensable exercise of police power, the decision is in conflict with *Conger v. Pierce County*, 116 Wash. 27, 35-36, 198 P. 377 (1921). In *Conger*, the Court noted that the purpose of the police power is to regulate and restrict the use of private property in the interests of the public. However, the *Conger* Court emphasized, the police power "... does not authorize the taking or damage of private property in the sense used in the Constitution with reference to taking such property for a public use." *Conger*, 116 Wash. at 35-36, quoted in *Eggleston v. Pierce County*, 148 Wn.2d at 780-781, 664 P.3d at 629 (Sanders, J., dissenting). Under *Conger*, the damaging of private property that occurred in this case would constitute a compensable taking and not a non-compensable exercise of the police power.

Second, we respectfully suggest that *Eggleston* is also in conflict with this Court's decision in *Dickgieser v. State*, 153 Wn.2d 530, 105 P.3d 26 (2005). In *Dickgieser*, the State Department of Natural Resources caused

damage to private property which was adjacent to state lands the department logged. This Court held that since the damage to the private property resulted from governmental activity reasonably necessary to the proper maintenance of other property, the damage was done for a public use, for which compensation was required. *Dickgieser*, 153 Wn.2d at 534-540, 105 P.3d at 28-32. Here, as in *Dickgieser*, the damage done to the Brutsche property during the service of the search warrant was done for a "public use" requiring compensation under Article I, § 16. *Eggleston* conflicts with *Dickgieser*.

Third, if *Eggleston* is viewed as a bar to recovery by Mr. Brutsche on his takings claim, it should be overruled because it was wrongly decided. As discussed in *Steele, Wegner* and *McGovern*, the issue in a takings case is not whether the police should be barred from causing property damage or punished for acting unjustifiably or wrongfully. Instead, the issue is whether the Constitution requires compensation by the municipality to an innocent third party for the property damage the police caused.

The state constitutional provisions examined in *Steele, Wegner* and *McGovern* are very similar to Washington's Just Compensation Clause. Those cases concluded that their state's Just Compensation Clause provided relief for innocent third party owners whose property was damaged by police action.

The *Eggleston* majority went the other way, apparently based upon its belief that "Article I, § 16 requires *prior* compensation". *Eggleston*, 148 Wn.2d at 624 (italics by Court). This apparently was a basis for the majority's conclusion that the vehicle for compensation for police damage to private property is not Article I, § 16. *Eggleston*, 148 Wn.2d at 774.

We respectfully contend that Article I, § 16 is not restricted to *prior* compensation. Article I, § 16 has long been held to require compensation where it is found to be due *after* the taking occurs. In fact, an entire field of court proceedings, inverse condemnation actions, exists to recover the value of appropriated property after the fact. *See Phillips v. King County* , 136 Wn.2d 946, 957, 968 P.2d 871, 876 (1998); *Dickgieser v. State*, 153 Wn.2d 530, 534-535, 105 P.3d 26, 28-29 (2005).[11]

The United States Supreme Court's jurisprudence is in accord with our position. That Court has recognized that a landowner is entitled to bring an action seeking compensation under the Fifth Amendment Just Compensation Clause after the loss has occurred:

> We have recognized that a landowner is entitled to bring an action in inverse condemnation as a result of "'the self-executing character of the constitutional provision with respect to compensation....' [citations omitted]. [I]t has been established at least since *Jacobs v. United States*, 290 U.S. 13, 54 S. Ct. 26, 78 L. Ed. 142 (1933), that claims for just compensation are grounded in the Constitution itself:
>
> > "The suits were based on the right to recover just compensation for property taken by the United States for public use in the exercise of its power of eminent domain. *That right was guaranteed by the Constitution*. The fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners did not change the essential nature of the claim. The form of the remedy did not qualify the right. It rested upon the Fifth Amendment. Statutory recognition was not necessary. A promise to pay was not necessary. Such a promise was implied

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[11] "The term 'inverse condemnation' is used to describe an action alleging a governmental 'taking' or 'damaging' that is brought to recover the value of property which has been appropriated in fact, but with no formal exercise of the power of eminent domain." *Dickgieser, supra.*

> because of the duty to pay imposed by the Amendment. *The suits were thus founded upon the Constitution of the United States.*" *Id.*, at 16, 54 S. Ct. at 27. (Emphasis added.)

First English Evangelical Lutheran Church, supra, 482 U.S. at 315, 107 S. Ct. at 2386.

It is significant that the courts analyzing similar constitutional provisions, with similar language, approved of post-event compensation for damage caused by police action. The Texas Just Compensation Clause analyzed in *Steele* states that "such compensation shall be first made, or secured by a deposit of money ...". *Steele*, 603 S.W.2d at 788. This language, which is quite similar to the Washington Constitution, posed no bar in *Steele* to compensation to the homeowner for damage done by the police action. Similarly, the Minnesota Just Compensation Clause analyzed in *Wegner* and *McGovern* states that private property should not be damaged "without just compensation, first paid or secured". *Wegner, supra*, 479 N.W.2d at 40. Again, this language is quite similar to Washington Const. Art. I, § 16. The "first paid or secured" language posed no bar in the Minnesota cases to compensation for the innocent third party property owners.

It is clear that an action can be brought to seek compensation under Article I, § 16 after the fact.[12] The *Eggleston* majority's apparent conclusion

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[12] The *Eggleston* majority suggested that it would be "administratively awkward" to require prior compensation for the destruction of property by police while executing a search warrant. *Eggleston*, 148 Wn.2d at 769. This situation need not arise. It is well-established by the Washington and federal inverse condemnation cases, as well as *Steele*, *Wegner* and *McGovern*, that a citizen may seek compensation for damage or destruction of property by police after the fact. Since, as demonstrated herein, prior compensation is not required, no issue of administrative awkwardness would be presented.

to the contrary was incorrect. To the extent that it was the basis of the decision, *Eggleston* should be overruled.

E. *Article I, § 16 Provides Broader Protection to Property Owners than the Fifth Amendment to the United States Constitution.*

> Article I, § 16 is significantly different from its United States constitutional counterpart, and in some ways provides greater protection.

Eggleston, 148 Wn.2d at 766. In *Eggleston*, the Court indicated that a satisfactory *Gunwall* (*State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986)) analysis was provided by an amicus. *Eggleston*, 148 Wn.2d at 767, fn.5. The Court also noted that:

> ... The threshold function *Gunwall* performs is less necessary when we have already established a state constitutional provision provides more protection than its federal counterpart. [Citation omitted.]

Eggleston, 148 Wn.2d at 767, fn.5.

To assist the Court in this case, we provide the following *Gunwall* analysis, analyzing the six non-exclusive criteria that Washington courts should consider in determining whether the state Constitution affords broader protection than the United States Constitution.[13]

1. *Differences in Language*

The first two *Gunwall* factors require examination of the differences between parallel provisions of the state and federal constitutions. Here, as the

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[13] This discussion is based in large part upon the *Gunwall* analysis provided in the ACLU's amicus brief in *Eggleston*, pp. 14-19.

Court noted in *Eggleston*, Article I, § 16 is significantly different. The text is more complete. The phrase "or damaged" was added. The state Constitution applies to takings or damagings for "private use" as well as the "public use" covered by the Fifth Amendment Just Compensation Clause. The structural differences in the state Constitution "allow ... Washington courts to forbid the taking of private property for private use even in cases where the Fifth Amendment may permit such takings." *Manufactured Housing Cmtys. Of Wash. v. State*, 142 Wn.2d 347, 361-362, 13 P.3d 183 (2000).

2. *State Constitutional and Common Law History*

The third *Gunwall* factor requires consideration of state constitutional and common law history. This Court's decision in *Brown v. City of Seattle*, 5 Wash. 35, 31 P. 313 (1892), provides a nearly contemporaneous explanation of the reasons for including the phrase "taken or damaged" in the state Constitution. *Brown*, 5 Wash. at 40-41. *Brown* was authored by Justice Stiles, a delegate to the 1889 Constitutional Convention. *See* C.H. Sheldon, *The Washington High Bench* 327 (1992). Justice Stiles' opinion in *Brown* makes it clear that the framers of the Washington Constitution included the word "damaged" in Article I, § 16 for a reason. Washington's Constitution insures that "[i]f private property is damaged for the public benefit, the public should make good the loss to the individual". *Brown*, 5 Wash. at 41.

3. *Pre-existing State Law*

The fourth *Gunwall* factor requires an examination of pre-existing state law. This factor also supports independent state constitutional analysis. For example, early Washington cases recognized that the word "damaged" has a distinct meaning and provides more rights to property owners than the word "taken" standing alone. *See Brown*, 5 Wash. at 39-41. Washington courts have continued to recognize that the term "taken or damaged" provides broad protection to Washington citizens. *Martin v. Port of Seattle*, 64 Wn.2d 309, 317-18, 391 P.2d 540 (1964).

4. *Structural Differences Between the State and Federal Constitutions*.

The fifth *Gunwall* factor concerns differences in structure between the state and federal Constitutions. This factor always weighs in favor of an independent state constitutional analysis. *See, e.g.*, *State v. Foster*, 135 Wn.2d 441, 448, 957 P.2d 712 (1998).

5. *Matters of Particular State Interest or Local Concern*

The sixth and last *Gunwall* factor requires consideration of "whether the subject matter is local in character or, alternatively, whether there appears to be a need for national uniformity". *Gossett v. Farmers Insurance Company*, 133 Wn.2d 954, 778-79, 948 P.2d 1264 (1997). Mr. Brutsche's claim involves an important matter of local concern: the obligation of municipalities to provide compensation for damage caused by municipal employees, such

as police officers, to the private property of innocent third parties. Moreover, more generally, governmental actions which cause damage to or interference with private property, whether they be land use rules and regulations, seizures, or forfeitures, are clearly traditional areas of state and local concern. Finally, local law enforcement matters are a traditional area of state and local concern. *See, e.g., State v. Young*, 123 Wn.2d 173, 180, 867 P.2d 593 (1994).

IV. *This Court Should Hold That the Damaging or Destruction of Petitioner's Property by the Police, Where No Evidence Was Seized or Used in a Criminal Prosecution, Constituted a Compensable Taking Under the Fifth and Fourteenth Amendments to the United States Constitution.*

The Fifth Amendment to the United States Constitution provides that "private property [shall not] be taken for public use, without just compensation".[14] The destruction of an innocent third party's property by the police while executing a search warrant constitutes a compensable taking under the federal constitution. *Wallace v. City of Atlantic City*, 257 N.J. Super. 404, 407-412, 608 A.2d 480, 482-484 (N.J. Super. 1992). Compensation is required whether or not the damage was proper. *See, e.g., First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 314-15, 107 S. Ct. 2378, 96 L. Ed. 2d 250 (1987) (stating that the Just Compensation Clause is "designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking") (italics by Court).

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[14] A copy of the Fifth Amendment is reproduced in the Appendix at page A-2.

In *Wallace*, the Atlantic City police executed a no-knock search warrant and made two arrests. They seized drugs and currency. During the course of the search, three doors of the premises were broken. The plaintiff, the landlord and owner of the property, brought an action seeking compensation for damages for the labor and material necessary to repair the doors–relief sought by Mr. Brutsche in this case. *Wallace*, 608 A.2d at 481.

The Court held that Mr. Wallace was entitled to compensation:

> Applying the above analysis to the facts of the instant case, plaintiff is entitled to compensation. The search was conducted for a public purpose, *i.e.*, a search for and seizure of property and concomitant arrests as part of an ongoing criminal investigation. As part of the investigation the police damaged plaintiff's property. As an innocent third party he should not bear the sole financial burden of such an undertaking. Since the damage was incurred for the public good, rather than for the benefit of the private individual, the public should bear the cost. The intended beneficiary of the police action was not plaintiff, but society as a whole.

Wallace, 257 N.J. Super. at 409-410, 608 A.2d at 483. The same analysis applies here.

Applying the Fifth Amendment Just Compensation Clause in this context does not abrogate or interfere with the right of police officers to carry out their duties. It simply requires that any damage done to the property of an innocent third party in the process be duly compensated by the municipality. As pointed out by the court in *Wallace*:

> Placing the burden on the public purse rather than on the purse of the innocent third party should not impair the police from effectively doing their job. It is a question of allocation of financial resources which local governments face every day. Just as local government must decide how many police to hire, whether to purchase new equipment, and similar issues, the decision of how much to allocate for the destruction of property during the execution of search warrants is a

> question to be determined at budget time, not by the police officer on the street.

Wallace, 257 N.J. Super. at 411-412, 608 A.2d at 484.

Petitioner is not contending that every time property is destroyed or damaged by government officials, such action would automatically require payment of just compensation. Instead, we are asking the Court to hold, as in *Wallace*, that the physical taking of property belonging to an innocent third party for a public purpose requires compensation by the municipality under the Fifth Amendment's Just Compensation Clause. The focus should be on compensating the injured rather than punishing the injurer. *See* C. Wayne Owen, Jr., *Everyone Benefits, Everyone Pays: Does the Fifth Amendment Mandate Compensation When Property Is Damaged During the Course of Police Activities?*, 9 Wm. and Mary Bill of Rights Journal 277 (2000) (cited in *Eggleston*, 148 Wn.2d at 772, fn.9.

V. Conclusion

A. Common Law Negligence Claim

Under the Court of Appeals' ruling here, police could act with impunity in negligently damaging or destroying the property of Washington citizens. Here, the Brutsche property consisted of most of a city block of buildings. Without a remedy, the police could go in and level every building on the premises without any consequence. *See Goldsby v. Stewart, supra,* 158 Wash. at 42 (noting that under a logical extension of the position taken by the

police therein, officers could remove "well-nigh an entire building" without being held accountable).

B. *Just Compensation Claim*

If the Court of Appeals' ruling on petitioner's just compensation claim were to be upheld, the property of an innocent third party could be damaged or destroyed by government action for a public purpose without compensation. This result would squarely contradict the policies of fairness and justice underlying the Just Compensation Clauses of the state and federal constitutions.

For the reasons stated, the Court of Appeals should be reversed, and the case remanded to the King County Superior Court for trial on Mr. Brutsche's common law negligence and just compensation claims.

DATED this the 31st day of August, 2007.

Respectfully submitted,

MUENSTER & KOENIG

By: _____
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LAW OFFICES OF JERALD KLEIN

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Of Attorneys for Petitioner Leo C. Brutsche

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§ 16 **EMINENT DOMAIN.** Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner, and no right-of-way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in courts of record, in the manner prescribed by law. Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public: *Provided,* That the taking of private property by the state for land reclamation and settlement purposes is hereby declared to be for public use. [AMENDMENT 9, 1919 p 385 § 1. Approved November, 1920.]

AMENDMENT V.

No person shall be held to answer for a capital or other infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

LEO C. BRUTSCHE, Appellant, v. CITY OF KENT, Respondent.	NO. 79252-6 CERTIFICATE OF SERVICE

I, ANDI ANDERSON, certify that on August 31, 2007, I served counsel of record with a copy of the following documents:

(1) Amended Supplemental Brief of Petitioner; and

(2) Praecipe for Correction of Errata in the Supplemental Brief of Petitioner;

via e-mail to:

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Counsel of Record for Respondent.

DATED this 31st day of August, 2007.

Respectfully submitted,

MUENSTER & KOENIG

Andi Anderson

ANDI ANDERSON, Legal Assistant

FILED AS ATTACHMENT
TO E-MAIL

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